No. 15778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER HOUSE,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, in an action brought by the plaintiff, a resident of the State of Arizona, against the defendant, a resident of the State of New York.

I.
Jurisdiction.

Jurisdiction is vested in this Court by authority of 28 U. S. C. A., Section 1332, subdivision a and a(1) thereof as being between the parties of diverse citizenship, to wit, a citizen of the State of Arizona and a citizen of the State of New York, and because the matter in controversy

exceeds the sum of $3,000.00 exclusive of interest and costs, and under 28 U. S. C. A., Section 1291 thereof under which "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States", the final judgment in this case being set forth in the Transcript of Record commencing on page 29 thereof.

II.

Statement of Case.

The Appellee in this case is Irene M. Carrier who, under the name Wishmaker House, conducted a retail store for the sale of furniture and appliances in the City of Phoenix, Arizona [Tr. of R. p. 46]. From 1948 to 1953 she worked in this store with her husband in various capacities [Tr. of R. p. 57], the store being known as Carrier's Furniture until January 1954 [Tr. of R. p. 57].

On April 10, 1953 or thereabout her husband went on a cruise apparently for his health [Tr. of R. p. 58] and as the Reporter's Transcript of her testimony shows, he did not return at any time to operate the business and plaintiff (Appellee) operated the business from and after said date of about April 10, 1953, to the date of the filing of the complaint herein in 1955.

That at the time her husband went on this trip there was $49,000.00 in outstanding liabilities, the great majority of which were from sixty to ninety days old [Tr. of R. p. 47] and was owing to at least sixty different creditors [Tr. of R. p. 61, also p. 100; Pltf. Exs. 1 and 2], and that she had assets of $70,000.00 [Tr. of R. pp. 84 and 85]. That on the day following Mr. Carrier's leaving a creditor, Arizona Hardware Company, called

upon the plaintiff (Appellee) and she told him that she felt that she was in a mess; also that Phoenix being small, the news got around very quickly that Mr. Carrier had gone on a cruise [Tr. of R. pp. 59 and 60]. That as a result of the call of the creditor, Arizona Hardware Company, she caused a financial statement and list of her creditors to be prepared [Tr. of R. p. 60] and took this statement to the Manager of Arizona Hardware Company and plaintiff (Appellee) herself suggested that she would go on a C.O.D. basis as one of the methods for solving her credit problem [Tr. of R. p. 61]. She then went to another creditor, General Electric Supply, talked to its Credit Manager, a Mr. J. Paxton, and stated to him that she would go on a C.O.D. basis and worked out a type of arrangement for payment of her indebtedness [Tr. of R. p. 62].

Plaintiff (Appellee) then proceeded to run sales to raise money for her creditors, as she stated her business was very poor, running sales at the end of April (1953) and a big sale in early June (1953) using the money to pay her creditors and placing $6,000.00 resulting from the sales with a Mr. Hill of Phoenix, who was the head of Phoenix Credit Men's Association. Three creditor's meeting were called in the month of June (1953) [Tr. of R. pp. 63 and 99], but after the creditors meetings the plaintiff (Appellee) conducted her business as best she could and made payments as best she could, and in November 1953 she entered into a written agreement with her creditors to pay them on their indebtedness $1,000.00 per month, but was only able to do so for three months [Tr. of R. p. 67]. All of this was done under the supervision of Mr. F. J. Hill, Manager of Wholesale Credit Association of Arizona (which is the

same as Phoenix Credit Men's Association mentioned above). [Testimony of Mr. Hill, Tr. of R. pp. 98 to 117].

On December 29, 1953, some nine months after plaintiff's (Appellee) *husband had left her* alone to run the business in the financial condition set forth in the foregoing statement of facts and after the calling of the various creditors' meetings and the drawing of the Amortization Agreement and the intervention of the Wholesale Credit Association of Arizona to aid plaintiff (Appellee) in the financial predicament in which she was left by her husband, *the defendant Lyon Furniture Mercantile Agency* (Appellant herein) *issued the first of several reports* to several of its subscribers *complained of by plaintiff* (Appellee) in her amended complaint and oral amendment to amended complaint [Pltf. Exs. 8, 10, 11, 12 and 15 and Tr. of R. pp. 245 and 246].

That the Appellee never did pay the $49,000.00 indebtedness in full but got it down to $9,700.00 by the end of January 1955 and then settled this $9,700.00 indebtedness for $3,000.00 [Tr. of R. p. 78].

The Appellant herein, Lyon Furniture Mercantile Agency, at all times complained of and since 1876 was and is a Credit Reporting Agency supplying its services to Credit Managers of manufacturers, wholesalers and jobbers in the home furnishing industry [Tr. of R. pp. 241-242]. It had eight offices from coast to coast, issued over one hundred thousand reports annually and published semi-annually a credit reference book in which is listed over one hundred and thirty thousand firms in this industry [Tr. of R. p. 242], its reports being issued only to subscribers under a contract and who requested reports in writing [Tr. of R. p. 242].

That of eight concerns named by the plaintiff (Appellee) in her amended complaint as having received the reports complained of by stipulation entered into in Open Court, it was stipulated that all of them with the exception of one were subscribers by contract to Lyon Furniture Mercantile Agency (Appellant herein), and received reports at their specific request from Lyon Furniture Mercantile Agency under the terms of their contract [Tr. of R. p. 204].

In her amended complaint [Tr. of R. p. 8] Paragraph IV, plaintiff (Appellee) charged that the reports issued by defendant (Appellant) Lyon Furniture Mercantile Agency were absolutely false in the following particulars:

a. That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress;

b. That the reports stated that plaintiff had no previous retail furniture experience;

c. That plaintiff employed a manager to operate said business;

d. That 1954 payments were slow;

e. That the bulk of plaintiff's purchases are being made on a C.O.D. basis.

Plaintiff (Appellee) further alleged in her amended complaint [Tr. of R. p. 9] Paragraph VI thereof, that the reports were wilfully and maliciously made, knowing them to be false when made and for the express purpose of destroying the plaintiff's (Appellee) credit and financial standing and of ruining her business, by reason of which she contended that she had suffered damages in the sum of $25,000.00 [Tr. of R. p. 9, Par. VIII of amended complaint].

The defendant (Appellant) in its answer denied all of the material allegations of the plaintiff's (Appellee) amended complaint, and as affirmative defenses alleged [Tr. of R. pp. 23 and 24] that it was a Credit Agency furnishing credit information to its subscribers upon subscribers requests therefor; that such reports as were issued by them were delivered in good faith and without malice on a privileged occasion and as a privileged communication to interested subscribers, and that they had reasonable cause to believe and did believe that the matters set forth in said reports were true.

That prior to the actual trial of the matter defendant (Appellant) made a timely motion to dismiss plaintiff's (Appellee) complaint upon the ground that the plaintiff (Appellee) had failed to file the undertaking in the sum of $500.00 as required by Section 830 of the Code of Civil Procedure of the State of California in actions for libel and slander [Tr. of R. p. 4], which said motion was denied [Tr. of R. p. 18].

III.

Specifications of Error Relied On.

In Appellant's statement or designation of points on appeal [Tr. of R. pp. 277 to 280 incl.] are set forth generally the specifications of errors relied on, but which are now specifically set forth as follows:

1. The Court below erred in not granting the Appellant's timely motion requiring the Appellee to file an undertaking as a condition precedent to the maintenance of this action for damages for libel.

2. The Court below erred in not granting the Appellant's motion for a dismissal at the conclusion of the Appellee's evidence.

3. The Court below erred in failing to find that the credit reports complained of and set forth in Appellee's amended complaint were privileged as a matter of law and as provided by Section 47, Subdivision 3, of the Civil Code of the State of California, and likewise failing to find that they were factually and substantially true, and also failing to find that they were made without malice in that malice was not inferred, as is clearly set forth in Section 48 of the Civil Code of the State of California.

4. The Court below erred in failing to find that the Appellants is and was at all times a National Credit Agency engaged in the business of issuing credit reports in the furniture industry to members or subscribers of said Agency.

5. The Court below erred as a matter of fact in failing to find that the Appellee did not suffer any damages by reason of the issuance of the credit reports complained of based upon any testimony given at the trial.

6. The Court below erred in failing to find that as a matter of law the Appellee could not recover any damages in the absence of a specific finding that the reports complained of in Appellee's amended complaint were not privileged or if privileged that they were actuated by malice.

7. The Court below erred in failing to find on material allegations both in Appellee's amended complaint and in Appellant's answer in the following respects:

a. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph IV of Appellee's amended complaint.

b. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph VI of Appellee's amended complaint.

c. The Court below has failed to find and there is no finding with respect to the allegations set forth in Paragraph IX of the Appellee's amended complaint.

d. The Court below has failed to find and there is no finding with respect to the allegations set forth in Appellant's first and second affirmative defenses.

e. The Court below has failed to find and there is no finding with respect to the allegations that the communications complained of were privileged and were published without malice.

8. The Court below erred in finding that the Appellant was "grossly negligent in its conduct", as found in Paragraph V of Appellee's Findings of Fact on file herein.

In submitting to this Court points and authorities to substantiate Appellant's contentions as outlined above that the Honorable District Court erred in each of the specifications of error set forth above, this Court's attention is respectfully called to the fact that the substantive law of the State of California (the place of trial) on the law of libel, on damages and evidence must guide this Court in the determination of this appeal and in determining whether or not the District Court erred.

Erie Railroad Co. v. Tompkins, 304 U. S. 64;
Anderson v. Hearst, 120 F. 2d 850;
35 C. J. S., p. 1236, etc.

IV.

The Court Below Erred in Not Granting the Appellant's Timely Motion Requiring the Appellee to File an Undertaking as a Condition Precedent to the Maintenance of This Action for Damages for Libel.

Section 830 of the Code of Civil Procedure of the State of California under the authority of which the motion to file an undertaking as a condition precedent to the maintenance of an action for libel, reads as follows:

> "Before issuing the summons in an action for libel or slander, the clerk shall require a written undertaking on the part of the plaintiff in the sum of five hundred dollars ($500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. *An action brought without filing the required undertaking shall be dismissed.*"*

Libel as this Court well knows and as is defined by Section 45 of the Civil Code of the State of California, is defined as follows:

> "Libel is a *false* and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

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*In all instances in this brief italics do not appear in the citations, but are used by counsel to emphasize the same.

Inasmuch as the substantive law of the State where the case is tried governs the trial of the case (*Erie Railroad Co. v. Tompkins, supra*) it is for this Court to determine whether Section 830 of the Code of Civil Procedure as quoted above is substantive or procedural only and governs in civil actions filed in the Federal Courts between citizens of diverse States. Even though the requirement for the filing of a bond as a condition precedent to the issuance of a summons in an action for libel or slander is found in the State Code of Civil Procedure it is respectfully urged and suggested that it is still a part of the substantive law of the State of California and therefore should govern and control the District Court in any District in the State of California on the question of the filing of the requisite bond.

In a case passed on by the District Court of the Southern District of California by the Honorable Pierson M. Hall, District Judge, *Keller Research Corp. v. Roquerre,* 99 Fed. Supp. 964 (decided September 11, 1951) the District Judge ordered the filing of a bond within five days as a condition to proceeding with a cause of action on a cross-complaint for libel. The defendant in that case (cross-complainant) contended that the California Act (Sec. 830, C. C. P.) was not applicable as the Federal Rules of Civil Procedure 28 U. S. C. A. contained no such provision for a bond and must prevail over any special act of the State of California. With reference to that contention the Honorable District Judge Hall referred to the case of *Cohen v. Beneficial Loan Corp.,* 337 U. S. 541, point 4 on page 542, wherein the Court stated:

> "A Federal Court having jurisdiction of a stockholders derivative action, only because of *diversity*

> *of citizenship* must apply a statute of the forum State which makes the plaintiff, if unsuccessful, liable for reasonable expenses including attorney's fees of the defense and provides that the corporation may require the plaintiff to give security for their payment as a condition of prosecuting the action."

The Supreme Court of the State of California in the case of *Kennaley v. Superior Court,* 43 Cal. 2d, page 512 on page 516, by inference in the opinion of counsel, upheld the necessity of the filing of a cost bond in the Federal Court as a condition precedent to maintaining a libel action as provided by Section 830 of the Code of Civil Procedure by referring to the case of *Keller Research Corp. v. Roquerre, supra,* on which the petitioner in the State Court case was relying in his motion to require the filing of a cost bond under a cross-complaint, the Supreme Court of the State of California saying in referring to the *Keller v. Roquerre* case *supra:*

> "The Federal Court there, assumed, without discussing the provisions of Section 830, that the Section applies to a cross-complaint. Section 830 does not admit of that assumption."

It would appear to counsel for the Appellant that from the foregoing the motion to require the filing of a bond should have been granted with the condition that if said bond were not filed within five days that the action should be dismissed.

It is the belief of counsel for the Appellant that a definite ruling on the point should be made by this Court for the future guidance of the Courts, litigants and counsel in future similar matters. It is believed in order to suggest that this Court should first determine whether

Section 830 of the Code of Civil Procedure of the State of California is a part of the substantive law as well as the procedural law, and further, to definitely rule whether or not in actions for libel or slander filed in the Federal Courts that the plaintiff should be required to file the bond provided for by said Section 830 of the Code of Civil Procedure before issuing summons. It is respectfully urged that the motion in this case should have been granted and that the refusal to do so constitutes reversible error.

V.

The Court Below Erred in Not Granting the Appellant's Motion for a Dismissal at the Conclusion of the Appellee's Evidence.

At the conclusion of the Appellee's case [Tr. of R. pp. 247 and 248] counsel for the defendant (Appellant) moved that the plaintiff's (Appellee) complaint be dismissed and that judgment be entered for the defendant (Appellant). It is respectfully contended that the motion should have been granted in that the evidence as reflected by the transcript of plaintiff's (Appellee) case [Tr. of R. pp. 44 to 247, incl.] failed to show that the reports complained of and published by the defendant (Appellant) were false, that they were actuated by malice, that they were unprivileged and that plaintiff (Appellee) was damaged by such reports.

All of the foregoing points were made in the motion and the argument on the motion [Tr. of R. pp. 247 to 258, incl.] and cases submitted in the argument in support of defendant's (Appellant) contentions that plaintiff's (Appellee) case should be dismissed.

There is set forth hereafter under this subhead the pertinent testimony and facts which the Trial Court had before it at the conclusion of the case, which counsel for Appellant respectfully suggests is more than sufficient to show that the plaintiff (Appellee) had failed to make out even a *prima facie* case or any case of libel.

On pages 258 and 259 of the transcript of record, counsel for the plaintiff (Appellee) in response to the motion to dismiss, made the following statements:

> "I find myself in a strange position of agreeing with many of the points made by the attorney for the defendant.
>
> I agree that there were many truthful statements made in these reports and I agree that *Mr. Halfyard or any of the partners were certainly not activated by malice at the time they made their reports, since it appears quite obvious that they didn't even know her.*
>
> And I also agree that this is their job to report, this is the business they have undertaken.
>
> At the time Mrs. Carrier took over this business. it was admittedly in a poor condition . . . Then she had substantial indebtedness . . . Our case isn't that this man was going to try to fix Mrs. Carrier. He didn't even know Mrs. Carrier, and neither did any of the other parties to this."

It is also deemed pertinent to ask this Court to refer to counsel for the plaintiff's (Appellee) opening statement to the Court as it appears on pages 46 to 53, inclusive, of the transcript of record, from which statement it will be apparent that the plaintiff (Appellee) was in a "financial mess" long prior to any reports issued by the defendant (Appellant), and also that the defendant (Appellant) was a

Credit Agency issuing credit reports to its subscribers with reference to retailers engaged in the furniture business.

That the defendant (Appellant) was a Mercantile Credit Agency issuing reports on credit and financial standings and was not actuated by malice and whose reports were qualifiedly privileged under Section 47, Subdivision 3 of the Civil Code of the State of California, was abundantly evident to the Court in the testimony of John J. Sigerson and other witnesses as will be hereinafter referred to. Section 47, Subdivision 3 of the Civil Code of the State of California reads as follows:

> "A Privileged Publication or Broadcase is one made—
>
> 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or (3) who is requested by the person interested to give the information."

At this point it is also well for the Court to have before it Section 48 of the Civil Code, which reads as follows:

> "In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication."

It is also in order for the Court to have before it Section 45A of the Civil Code and Section 48A, subdivision 4(b) and (d), which read as follows:

45A Civil Code:

> "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be

a libel on its face. *Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage* as a proximate result thereof. Special damage is defined in Section 48A of this Code."

Section 48A, subdivision 4(b):

"'Special Damages' are all damages which plaintiff *alleges and proves* that he has suffered in respect to his property, business, trade, profession or occupation including such amounts of money as the plaintiff *alleges and proves* he has expended as a result of the alleged libel, *and no other;*

(d) "'Actual Malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a *good faith belief* on the *part of the defendant* and in the *truth* of the libelous publication or broadcast at the time it is published or broadcast *shall not constitute actual malice.*"*

Mr. Sigerson, a witness produced by the plaintiff (Appellee) and whose testimony appears starting on page 239 of the Transcript of Record, testified as follows:

"Q. (By Mr. Licht) What is your occupation, Mr. Sigerson?

A. General Manager of the Lyon Furniture Mercantile Agency.

Q. And your office is in New York, is that correct?

A. The executive office is in New York.

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*The italics used herein do not appear in the text of the Code definitions but are used by counsel for emphasis.

Q. And are you also a partner in this firm?

A. I am.

* * * * * * * *

Cross-Examination.

Q. (By Mr. W. E. Catlin) Mr. Sigerson, I believe you stated you are the General Manager of the Lyon Agency?

A. That is correct.

Q. Do you know when the Lyon Agency was organized?

A. Yes it was founded in 1876.

Q. How many offices does it have in your organization?

A. Presently from coast to coast, eight offices.

Q. What is the type of business carried on by the Lyon Furniture Mercantile Agency?

A. The Lyon Furniture Mercantile Agency is a credit reporting agency supplying the mercantile agency service to the credit managers of manufacturers, wholesalers and jobbers in what might be termed the home furnishing industry.

Q. Mr. Sigerson we have here that has been exhibited several times a credit reference book of the Lyon Furniture Mercantile Agency. Is this a publication by the Agency?

A. That is published semi annually by the Agency and has been since 1876.

Q. Do you have any idea how many firms are listed in this publication?

A. Roughly over 130,000.

Q. Do you have any idea how many reports are issued by the organization per year?

A. I would say over a hundred thousand.

Q. To whom are reports issued by the Lyon Furniture Mercantile Agency?

A. Only to subscribers under contract who have written in requesting the reports.

Q. In other words, Mr. Sigerson, before a person can obtain the services of the reporting section of the Lyon Agency, they must enter into a contract with you?

A. Into a written contract.

Q. And this contract defines the rights and the circumstances under which a report will be granted, is that correct?

A. That is correct.

Q. Now Mr. Sigerson, is it true that these reports are only issued at the specific request of a subscriber?

A. That is correct.

Q. Mr. Sigerson, are you personally acquainted with Mrs. Irene Carrier?

A. Yes.

Q. Would you tell the court when you became acquainted with her?

A. I met her at her place of business on Memorial Day, May 30, 1955-'56, please.

* * * * * * * *

Q. This was the only time in your life prior to this trial that you met her?

A. The only time I ever met Mrs. Carrier.

Q. Now had her name ever come to your attention as an individual prior to the filing of this action?

A. I never heard of Mrs. Carrier prior to that.

Q. Did you have any ill will or malice toward her personally?

A. None whatever.

* * * * * * * *"

On page 221 of the Transcript of Record there appears the following testimony on behalf of the plaintiff (Appellee):

"Q. Now Mr. Halfyard, did you have any personal animosity toward Mrs. Carrier?

A. Of course not. Not the least. I didn't know the lady any more than by name.

Q. Did you have any knowledge of her except through the information contained in your folder?

A. No, none whatsoever.

Q. Mr. Halfyard at the time you wrote the 1953, '54 and '55 reports, did you believe all the information you put into the reports that you created to be true?

A. I did."

From the testimony of Mrs. Irene Carrier on the question of her knowledge that the defendant (Appellant) was a credit agency and on the question of malice we quote her testimony as follows starting at page 87 of Reporter's Transcript:

"Q. (By Mr. W. E. Catlin) Do you know, Mrs. Carrier, the type of business the Lyon Furniture Mercantile Agency is engaged in, of your own knowledge?

A. Yes. It's credit.

Q. Credit. By that you mean they write credit reports?

A. They are a credit reporting agency, as far as I know, and a collection agency.

Q. It is a credit reporting agency?

A. And a collection agency.

Q. And are you at all familiar in your dealings as a retail furniture business-woman with the methods in which they operate? By this I specifically mean that they have subscribers to their business?

A. I know you have subscribers.

Q. And do you also know of your own knowledge that to get a report from the Lyon Company you must be a subscriber to their services?

A. That is what I am told."

And on the question of malice as testified to by Mrs. Carrier after much sparring around she testified as follows, page 93 of the Transcript of Record:

"Q. All right beyond these three people, one that you can't identify, one identified as Mr. Abernathy and one identified as Mr. Sigerson, you have never had any contact with any other member of the Lyon Company?

A. No, sir, I have not.

Q. Now Mrs. Carrier, would you tell me which of these three, if any, have ill will against you?

A. I don't think personally, if you want to break them down individually, that they have ill will towards me. I think as an organization you are doing the wrong thing and printing the wrong thing I have to judge you by what you do, not by what you say."

If the Court will take into consideration all of the foregoing it becomes apparent at once that the defendant (Appellant) is a Mercantile Credit Agency and that its reports are qualifiedly privileged under Section 47, subdivision 3 of the Civil Code of the State of California, that it affirmatively appears that it had no malice notwithstanding the fact that under Section 48 of the Civil Code malice is not inferred or presumed as to a qualifiedly privileged communication, and as a matter of law the plaintiff (Appellee) must allege and prove malice in order to make out a case, which it certainly failed to do in this case.

* * * *

In the event the evidence discloses a case of qualified privilege, malice is not presumed; and in order to state a cause of action the plaintiff must allege and prove malice.

Locke v. Mitchell, 7 Cal. 2d 999.

It is a general rule that a Mercantile Agency's credit reports to interested subscribers is qualifiedly privileged. In the case of *Cullum Motor Sales v. Dun & Bradstreet,* found in 90 Southeastern Reporter 2nd at page 370 (which is a case of the Supreme Court of the State of South Carolina decided December 6, 1956) the Court said:

> "The defense of qualified privilege is available to a mercantile agency in respect to reports on credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter. Report by a mercantile agency to a subscriber who had requested information concerning financial condition of an automobile dealer was qualifiedly privileged, and although false, was not actionable in the absence of malice."

To the same effect as the foregoing is the case of *Watwood v. Stone's Mercantile Agency, Inc.,* 194 F. 2d 160 (certiorari denied, 344 U. S. 821).

To the same effect that malice is not inferred from the communication in addition to the Civil Code, Section 48, *supra,* is the case of *Davis v. Hearst,* 160 Cal. 143 at page 164, and the case of *Miles v. Rosenthal,* 90 Cal. App. 390.

Nowhere in the transcript of the testimony of plaintiff (Appellee) and all the witnesses called by her [Tr. of R. pp. 53 to 247] is there any testimony of any actual or even implied malice, nor any testimony that the defendant (Appellant) was not a Mercantile Agency and/or that

its reports were not qualifiedly privileged, or that she suffered any special damages, but quite to the contrary all of the testimony as set forth and referred to hereinabove affirmatively shows that there was no malice and that the reports complained of were qualifiedly privileged.

In addition to the cases cited above there are many other cases such as *Freeman v. Mills,* 97 Cal. App. 2d 161, and *Snively v. Record Publishing,* 185 Cal. 565, which hold that even though a statement may be defamatory and false (of which there is no proof of any kind by the Appellee in this case) it is privileged if it is published without malice, and if it affirmatively appears that a communication was privileged (which is the fact in this case) in order to make out a *prima facie* case the plaintiff must *allege* and *prove* the existence of malice.

In the case of *Brewer v. Second Baptist Church of Los Angeles,* 32 Cal. 2d page 791, a general statement of law is made as follows:

> "Malice destroying a privilege may not be inferred from the fact alone of the communication of the defamatory statement."

In the case of *Emde v. San Joaquin County Central Labor Council,* found in 23 Cal. 2d at page 146, is the following statement of law:

> "Where publication is conditionally privileged no right of action arises because publication is false unless publishers were actuated by malice, and malice is not inferred from the publication."

It is respectfully submitted that in the consideration of all of the foregoing, and resolving every inference in favor of the plaintiff, as the Court must do in considering a motion for a dismissal at the conclusion of a plain-

tiff's case, that based upon the evidence submitted by the plaintiff and based upon the law applicable to the facts, the District Court erred in denying the motion for a dismissal at the conclusion of the plaintiff's (Appellee) evidence.

VI.

The Court Below Erred in Failing to Find That the Credit Reports Complained of and Set Forth in Appellee's Amended Complaint Were Privileged as a Matter of Law and as Provided by Section 47, Subdivision 3 of the Civil Code of the State of California, and Likewise Failing to Find That They Were Factually and Substantially True, and Also Failing to Find That They Were Made Without Malice in That Malice Was Not Inferred, as Is Clearly Set Forth in Section 48 of the Civil Code of the State of California.

Rule 52 of the Federal Rules of Civil Procedure, which are entitled "Findings By The Court" require "in all actions tried upon the facts without a jury or with an advisory jury the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

It is unquestionably the law of the State of California that the failure of a Court to find upon a material issue is reversible error, and the Court's attention is respectfully called to only one or two late cases re-expressing and reaffirming the foregoing statement of law.

In the matter of *Renfer v. Skaggs,* 96 Cal. App. 2d, at page 383 our Appellate Court said:

> "If the court fails to find on material issues made by the pleadings—issues as to which a finding would have the effect to countervail or destroy the effect of

the other findings—and as to which evidence was introduced, the decision is 'against law.'"

In the case of *San Jose etc. Title Insurance Co. v. Elliott,* 108 Cal. App. 2d, at page 801, the Court said:

> "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground . . . for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining." Citing innumerable cases in support of this point.
>
> *"This rule applies to issues raised by the answer as affirmative defenses and to issues raised in cross complaints."*

The plaintiff's (Appellee) amended complaint in Paragraph VI thereof [Tr. of R. p. 9] alleges:

> "That the defendant wilfully and maliciously made the aforesaid reports and delivered them to the aforementioned persons and its subscribers knowing the same to be false when it made them, for the express and sole purpose of destroying the pliantiff's credit and financial standing and of ruining her business."

The Finding with reference to said Paragraph VI is Finding Number V [Tr. of R. p. 28] and reads as follows:

> "That the defendant, acting by and through its duly authorized agents and servants *was grossly negligent* in the preparation of the aforesaid reports in that then and there there was in its possession information showing a substantially more favorable condition of

> plaintiff's business and of plaintiff's financial condition than was reported. The defendant *was grossly negligent* in the interpretation of the financial condition of the plaintiff as disclosed by the aforesaid statements and information then and there available to defendant."

It is respectfully suggested that the Finding Number V above is in no way a Finding that the defendant acted "wilfully and maliciously" as is alleged in Paragraph VI of plaintiff's (Appellee) amended complaint set forth above. Quite to the contrary, the case of *Davis v. Hearst,* 160 Cal. 143 at pages 167, 172 and 173 states:

> "But the truth is that mere negligence or mere carelessness *can never be evidence of malice in fact.* In the same act they cannot even co-exist. Malice necessarily imports an evil purpose. *Negligence necessarily implies an absence of intent or purpose.*
>
> *Mere inadvertence or forgetfulness or careless blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true."*

It is therefore respectfully urged that the Finding Number V above is not a Finding of wilfullness and maliciousness as alleged in Paragraph VI quoted above of plaintiff's (Appellee) amended complaint, and it must be proved and found in order for the plaintiff (Appellee) to prevail, and that under the authority of Rule 52 of the Federal Rules of Procedure and the California cases cited above in this specification of error, the Court has failed to find malice and/or wilfullness a material issue in this case and for this reason the judgment of the Lower Court should be reversed.

VII.

The Court Erred in Failing to Find That the Appellant Is and Was at All Times a National Credit Agency Engaged in the Business of Issuing Credit Reports in the Furniture Industry to Members or Subscribers of Said Agency.

The defendant (Appellant) in its affirmative defenses set forth on pages 22, 23 and 24 of the Transcript of Record, alleges that it was in the business of a Mercantile Agency by compiling and furnishing to its subscribers on request information of the history, standing and condition of merchants, traders and others engaged in business within the limits of the United States, or elsewhere, or in other words, a National Credit Agency. The proof of that fact is hereinabove set forth by competent affirmative evidence introduced by the plaintiff (Appellee) herself when she called the witness John J. Sigerson, whose testimony is quoted verbatim above and is uncontradicted, and is nowhere contradicted. It is a material issue, and under the authority of *Title Insurance Co. v. Elliott, supra,* and other California cases, as well as Federal Rules of Civil Procedure, Rule 52, it is reversible error to fail to find on the issue raised by the answer as an affirmative defense. The Findings in this matter are silent on that affirmative defense and there is no Finding, and the failure to make a Finding is, it is respectfully submitted, under the authorities, reversible error.

VIII.

The Court Erred as a Matter of Fact in Failing to Find That the Appellee Did Not Suffer Any Damages by Reason of the Issuance of the Credit Reports Complained of Based Upon Any Testimony Given at the Trial.

In the opening statement made by Appellee's counsel appearing on page 52 of the Transcript of Record, Appellee's counsel said:

> "Now, *on the question of damage,* your Honor, I am aware *we are in a field most difficult to determine.*
>
> We will have some evidence of the earnings of the business before this first report was brought out on Mrs. Carrier, and I am aware that there have been substantial changes in the business.
>
> *I am also aware that we are in a field which clearly borders on the speculative.*"

Section 3301 of the Civil Code of the State of California reads as follows:

> "*Damages must be certain.* No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Generally remote, uncertain and speculative damages are not recoverable.

> *Julian Petroleum Corp. v. Courtney Petroleum Co.,* 22 F. 2d 360.

Damages which are purely speculative, fanciful and imaginary cannot be recovered. . . .

> *Williams v. Krumsiek,* 109 Cal. App. 2d, p. 456.

Damages to health, reputation, or feelings are not clearly ascertainable in nature or origin, and damages for remote causes and effects cannot be recovered.

McGregor v. Wright, 117 Cal. App. 186.

Nowhere in the transcript of the testimony is there any affirmative testimony to show that the plaintiff (Appellee) was damaged in any respect by the issuance of the reports by the Appellant. An attempt was made by counsel for the Appellee to introduce some testimony as to the matter of damages, and the Court's attention is respectfully called to such testimony appearing in the Transcript of Record at page 244 and reading as follows:

"Q. (By Mr. Licht): Now Mrs. Carrier, you recall that yesterday I had asked you some questions with respect to the damage which you alleged in your claim. Do you have at this time any way of more specifically fixing the damages than at that time; have you made any calculations?

A. Yes. May I have my purse, please? Thank you.

(The Witness removes paper from envelope.) I made a list here of moneys thrown into that business.

Mr. Catlin: I can't hear you.

Mr. Licht: Would you speak louder, please.

A. I made a list of approximate moneys put into that business in order to keep it open. It was done by refinancing and mortgage on the building, most of it.

Q. And how much *additional capital* did you put in because of that?

The Witness: I put a total of $20,100. Some of that was for own personal furniture that I sold,

as we were liquidating the business, as I came out of the new house, and it was $1,675, it was new merchandise. It had been in the new home about three months. I merely threw it back into the business and sold it and threw the funds right into the business. The rest of it was by refinancing a mortgage.

Q. (By Mr. Licht): You did that on more than one occasion?

A. Three different times.

Mr. Licht: I have nothing further, your Honor."

It is submitted that the foregoing testimony or any testimony in the transcript of testimony of the plainiff (Appellee) is no testimony of special damages as defined by Civil Code Section 48A, 4(b) as set forth hereinabove. The testimony shows that this plaintiff (Appellee) was asked by her counsel "How much *additional capital* did you put in because of that" and her testimony had to do with the "additional capital." It is respectfully submitted that putting capital into a business is in the nature of an investment and is not "damages", nor is the Finding Number VII "that the allegations contained in Paragraph VIII are true except that the Court finds that the plaintiff has been damaged in the sum of $2000" is a finding of special damage predicated upon any testimony that was before the Court for its consideration, and that the failure to find in favor of the defendant (Appellant) that there was no "special damages" as herein defined in libel cases, was error and reversible error on the part of the District Court.

IX.

The Court Below Erred in Failing to Find That as a Matter of Law the Appellee Could Not Recover Any Damages in the Absence of a Specific Finding That the Reports Complained of in Appellee's Amended Complaint Were Not Privileged, or if Privileged That They Were Actuated by Malice.

Again the defendant (Appellant) in its answer appearing on pages 22 and 23 of the Transcript of Record, as an affirmative defense set forth and alleged the defense that because it was a Mercantile Agency compiling and furnishing its services to its subscribers at their specific request that their reports were privileged, and that they were not actuated by malice.

As in the error complained of above that the Lower Court failed to find that the Appellant was a National Credit Agency, so did the Lower Court fail to find on the affirmative defenses set forth under this allegation of error on the part of the Lower Court, and it is again respectfully submitted, without the necessity of again stating the law and referring to the cases, that the affirmative defenses of privilege and lack of malice were affirmative defenses and there was testimony on the subject, but that the Findings are silent on these material issues and there are no Findings on these material issues and that as a matter of law said failure to make Findings on these material issues, even though set up as an affirmative defense, constituted reversible error.

X.

The next point raised as error on the part of the Lower Court and designated in the Points on Appeal as numbers 7 a, b, c, d and e, and found on page 279 of the Transcript of Record, is in effect a restatement of all of the errors hereinabove specifically referred to and set forth in Paragraphs III, VI, VII, VIII and IX hereof, and it would be repetitious to repeat and restate all of the points and authorities and the law applicable to the specification of error referred to as 7 a, b, c, d and e as hereinabove referred to, and it is respectfully suggested that this Court will take the foregoing points into consideration in disposing of this specification of error.

XI.

The Court Below Erred in Finding That the Appellant Was "Grossly Negligent in Its Conduct" as Found in Paragraph V of Appellee's Findings of Fact.

It is respectfully suggested that this point has likewise been fully covered in the foregoing comment appearing under Paragraph Number VI finding that the Appellant was "grossly negligent in its conduct" rather than finding, as it was necessary for the Court to do, on the allegation that the defendant (Appellant) wilfully and maliciously made the reports complained of. To restate the comment under this specification of error would, it is believed, be likewise repetitious and the Court is therefore respectfully referred to the comment and statements set forth in allegation number VI in this brief.

ARGUMENT AND FURTHER POINTS AND AUTHORITIES.

Plaintiff's (Appellee) action is for damages resulting from an alleged libel to which the defendant (Appellant) has set up as a defense "truth" and "qualified privilege" and has denied any damages.

The Chief Judge in this District, the Honorable Judge Leon R. Yankwich, has written several books replete with points and authorities on the subject of libel. His latest work was published in 1950, and it is entitled "It's Libel Or Contempt If You Print It", and it is from this writing, and on page 308 thereof, that counsel desires to argue in favor of Appellant's position and defense, and which writing on page 308 reads as follows:

> "The defense of privilege under subdivision 3 of section 47 *does not depend at all on the truth of the defamatory charge.* With respect to that form of qualified privilege *the code does not require that the publication shall be true in order to bring it within the protection of the privilege.* The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, *since the proof that it was true would be a complete defense* without proof of any other facts and without proving the absence of actual malice.
>
> Furthermore, the proposition that one is not liable for damage, if, without malice, he states something

to another which under the circumstances he is lawfully authorized to tell him, *necessarily implies that the statement made may not be accurate;* that is to say, *that it may be untrue, but that under such circumstances the plaintiff cannot recover damages.* This is the established law in many cases of privilege and no question is ever made about it."*

Again on page 313 of the same writing under the heading of "Privilege and Malice" it is stated:

"In each case (*communications by or to interested persons,* reports of judicial, legislative or other public proceedings, or reports of public meetings) the privilege is dependent upon the absence of malice in fact.

Such malice in fact is not inferred from the communication or publication.

*Nor is it ever presumed."***

Counsel for the Appellant believes that the foregoing states some of the basic principles of the law of libel on which the Appellant relies, and that said statement of law would indicate that if Appellant comes within its purview, as it has alleged and believes that it does, then certainly the District Court has erred in finding for the plaintiff and Appellee in this matter and in refusing to grant the motion for a new trial, which was timely made.

In California a distinction is made between libel *per se* or libel that is defamatory on its face and a libel that is not libelous *per se*. This distinction is set forth in Section

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*The Code Section referred to is Section 47, subdivision 3 of the Civil Code of the State of California. The italics do not appear in the text but are used by counsel for emphasis.

**The italics do not appear in the text but are used by counsel for emphasis.

45A of the Civil Code of the State of California, which has been quoted in this Brief under Paragraph V. It is respectfully urged that alleged statements claimed to have been made [as appears in Paragraph IV of Appellee's amended complaint, Tr. of R. p. 8] by the defendant (Appellant) importing to the Appellee "the securing of said business by corecion and duress," and in stating that Appellee "had no previous retail furniture experience," that Appellee "employed a manager to operate said business," "that 1954 payments were slow," and that "the bulk of plaintiff's purchases are being made on a C.O.D. basis," are not defamatory or libelous *per se,* and under said Section 45A of the Civil Code of the State of California "defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48A of the Civil Code."

Even though Appellant's counsel has quoted and referred to the definition of special damages heretofore as appearing in Section 48A, subdivision 4(b) of the Civil Code of the State of California, it is well at this point to set forth its definition again and as follows:

> " 'Special Damages' are all damages which plaintiff *alleges* and *proves* that he has suffered in respect to his property, business, trade, profession, or occupation including such amounts of money as the plaintiff *alleges* and *proves* he has expended as a result of the alleged libel, and no other."

It is respectfully submitted that Appellee may have alleged "special damage" but has failed to prove "special or any damage."

* * * *

"Whether a publication is libelous on its face is a question of law."

The question of privilege is one of law when the facts and circumstances under which a publication is made are not disputed.

Freeman v. Mills, 97 Cal. App. 2d 161 (at pp. 165 and 166).

* * * *

In a late case decided in 1956 the Court stated as follows:

"In Oregon it is well established that *there can be no recovery for a defamatory statement which is qualifiedly privileged, unless it was shown to have been made with actual malice."**

Pomeroy v. Dun & Bradstreet, 146 Fed. Supp. at p. 59.

In conclusion counsel for the Appellant respectfully urges that under the pleadings in this matter the Appellee did not prove her case by a preponderance of evidence as is required by law, that she did not prove any "malice or ill will"; that she did not prove any "damages" whether general or special; that it does affirmatively appear that the Appellant is a National Mercantile Credit Agency and that the reports which the Appellant issued were qualifiedly privileged under our law; that they were issued without "malice or ill will"; that they were based upon data and information which they received from the various sources indicated in the transcript of testimony that is before the Court; that they were submitted only

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*The italics do not appear in the text but are used by counsel for emphasis.

to subscribers to the service of the Appellant and only at the request of such subscribers; that the statements were "factually and substantially true", and that the Lower Court erred in each and all of the respects and points hereinabove specifically set forth in this Brief, and as stated by the Court in the case of *Globe Furniture v. Right,* 265 Fed. at page 875, which is a Circuit Court of Appeal Case of the District of Columbia

> "It is inconceivable how the business of the country under present conditions, can be carried on, if a businessman or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated."

Under Rule 59(a)2 of the Federal Rules of Civil Procedure the Court may completely reverse its prior judgment and give judgment for the opposing party if the evidence taken at the trial justifies it and if the motion raises only a question of law, and it is respectfully urged that not only should the judgment in this case be reversed, but rather than ordering a new trial, that following said Rule 59(a)2, the Court direct that judgment be entered in favor of the Appellant for costs.

Respectfully submitted,

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